Singapore Case Note: Interpretation of MSAs and Inadmissibility of Evidence from Mediation

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As the practice of cross-border mediation grows, it is imperative for legal and other professional advisers involved in drafting mediated settlement agreements (MSAs) to become familiar with how different courts deal with litigation about MSAs. In this post, we look at a recent 2019 decision of the Singapore High Court, Jumaiah bte Amir and Another v Salim bin Abdul Rashid. The decision is directly relevant to the drafting of MSAs as it deals with interpretation; it is also indicative of the Singapore courts' approach to mediation confidentiality.

First, we set out the facts and claims relevant to mediation, followed by the Court's decision, and then finally lessons learnt.

Brief facts

The Plaintiffs, Jumaiah and Ezzad, and Defendant, Salim, were initially locked in a legal battle over a real estate deal that fell through in 2016. They were directed to mediation after filing a suit in the Singapore High Court and reached a settlement agreement in July 2017. The events which conspired after the signing of the MSA led to this enforcement suit. It's important to note that the 2017 Singapore Mediation Act does not apply here as the Act only came into force on 1 November 2017. So the Court was dealing with general law principles here.

In the MSA, Salim was given the option to purchase the disputed property at S$3 million if he was unable to find another party to purchase it by 31 December 2017; but if he were to successfully find a purchaser who was willing to pay more than S$3 million for it, he was entitled to keep the profits of the deal (i.e., the difference between the purchase price and S$3 million). In the meantime, Salim agreed to pay a sum of S$9000 in rent to Jumaiah and Ezzad beginning from 1 August 2017 "to the date of Completion of the sale of the Property."

Salim found a buyer who withdrew his offer of S$3.4 million at the eleventh hour. On 2 January 2018, having been unsuccessful in finding a purchaser, he decided not to exercise his option to purchase the property, and returned vacant possession of it to Jumaiah and Ezzad a few days later on 8 January 2018. Several months later, Jumaiah and Ezzad sold the property at S$3.38 million on 30 April 2018.

This suit involves claims and counter-claims between the Plaintiffs and the Defendant in respect to the property's transaction post-mediation. Relevant to this post, Jumaiah and Ezzad claimed that

pursuant to the MSA, Salim ought to make rental payments up till 30 April 2018, when the property was sold. However, Salim disputes this by arguing that the terms of the MSA were ambiguous as to the scenario in which he was to deliver vacant possession of the property; in this case, it may be implied under private law principles of interpretation that he may cease to make the rental payments after vacant possession was delivered.

Salim filed a counterclaim, arguing that he was entitled to reimbursements for renovation expenses amounting to S$286,066.10 incurred throughout the property transaction. In spite of the fact that such reimbursements were not expressly reflected in the MSA, Jumaiah and Ezzad argued that the issue of renovation expenses was resolved at mediation and formed a part of the MSA and should not be re-litigated.

Decision of the High Court

The decision centred on the interpretation of the ambiguous terms in the MSA. Justice Choo Han Teck applied the contra proferentum rule – which is a legal technique applied in contractual construction – ruling that "any ambiguity in the Settlement Agreement will be construed against the maker of the document" (at [14(c)]). In this instance, Jumaiah and Ezzad who sought to rely on the ambiguity and benefit from it were found by the High Court to be the 'makers' of the MSA (see [14](c)). His Honour opined, "Had the parties intended that Salim was to pay rent till the Property was sold regardless of whether he was in possession or not, that should have been specifically expressed in the Settlement Agreement." It was considered an onerous obligation to hold Salim liable to pay rent on an unspecified timeline, as it might take several months or years before the vacated property is sold.

Further, in respect to Salim's counterclaim for reimbursements for renovation expenses, the High Court was unable to find that this issue had been resolved at mediation in July 2017. The MSA had made no reference to any renovation expenses (see [17]). Moreover, Justice Choo ruled that the Court may not indulge in implying that this issue was discussed in the first place at mediation, owing to the fact that "[c]orrespondence between parties in mediation are confidential and made without prejudice. To retain that confidentiality and to encourage such mediations, the court should therefore not delve into correspondence exchanged in the mediation process unless it is necessary, for example, to determine whether an agreement has been reached or if parties had agreed to disclose such communications" (at [17]). Nevertheless, whilst His Honour allowed Salim to plead his claim in the High Court for the reimbursements for renovation expenses, the Court eventually rejected the claim as he did not submit sufficient evidence to prove the claim.

Lessons Learned

For advocates and parties in mediation there are four main messages for those engaging in mediation under Singaporean law:

1. Careful and meticulous drafting of MSAs is essential.
2. Ambiguous terms may be interpreted narrowly against the party seeking to benefit from the relevant clause in an MSA.
3. Issues resolved at mediation that are reflected in an MSA cannot be re-litigated. It is likely that the Singapore Courts will strike them out as an abuse of court process (see also the case of Violet Netto).
4. Confidentiality is not absolute and exceptions to confidentiality aim to ensure the accountability of participants in mediation. At the same time, Singapore courts will be reluctant to pierce the veil of confidentiality that shrouds the 'without prejudice' correspondence between parties at mediation

to prove that an issue was discussed and potentially resolved at mediation. Where an issue is not referred to in an MSA, Singapore courts will be slow to imply that it has been resolved at mediation.

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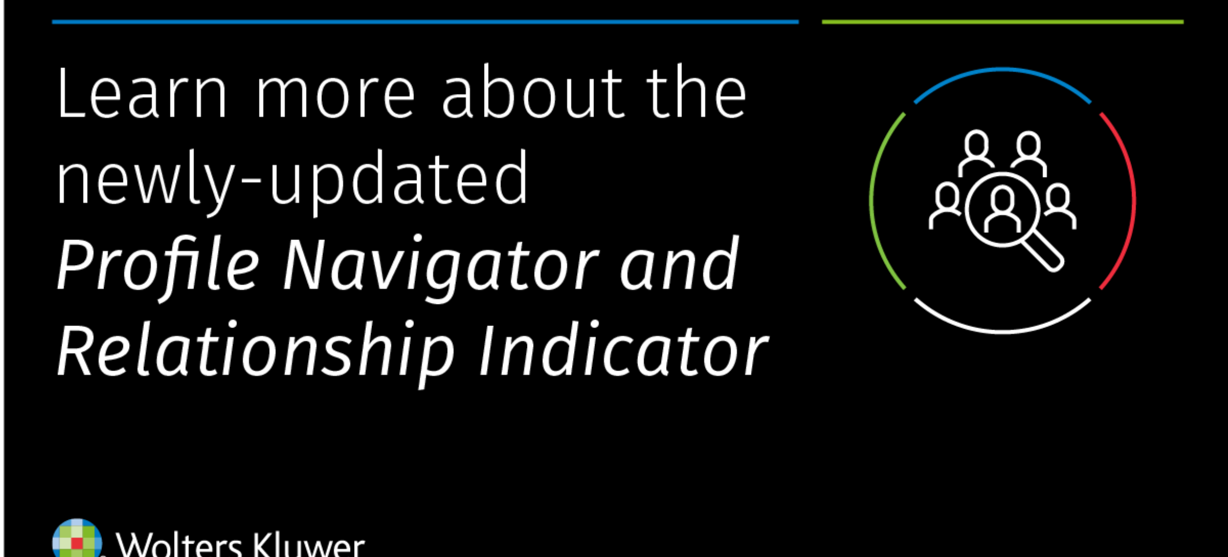

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